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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 289

MILTON MARGOLES, *Petitioner,*

against

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	4
Statement of the Case	4
Reasons for Granting the Writ	13
Argument	15
Conclusion	25

Appendix A: Opinion of the Court of Appeals	1a
Opinion of the District Court	15a
Order of the District Court	23a
Appendix B: Constitutional and Statutory Provisions	24a

CITATIONS

CASES:

Coppedge v. *United States*, 106 U.S. App. D.C. 275, 272 F.2d 504 (1959), *cert. denied*, 368 U.S. 855 (1961) 22
Delaney v. *United States*, 199 F.2d 107 (1st Cir. 1952) 18
In Re Murchison, 349 U.S. 133 (1955) 15, 17
Irvin v. *Dowd*, 366 U.S. 717 (1961) 24
Krulewitch v. *United States*, 336 U.S. 440 (1949) .. 20
Margoles v. *United States*, 294 F.2d 371 (7th Cir.), *cert. denied*, 368 U.S. 930 (1961) 4
Marshall v. *United States*, 360 U.S. 310 (1959) 14, 15, 21, 24
Miranda v. *Arizona*, 384 U.S. 436 (1966) 14
Rideau v. *Louisiana*, 373 U.S. 723 (1964) 18
Sheppard v. *Maxwell*, 384 U.S. 333 (1966) ...13, 14, 17, 18
Silverthorne v. *United States*, 400 F.2d 627 (9th Cir. 1968) 15, 22, 23

Page

Smith v. *United States*, 236 F.2d 260 (8th Cir.) *cert. denied*, 352 U.S. 909 (1956) 22
Turner v. *Louisiana*, 379 U.S. 466 (1965) 17
United States v. *Accardo*, 298 F.2d 133 (7th Cir. 1962) 15, 23
United States ex rel. Bloeth v. *Denno*, 313 F.2d 364 (2d Cir.), *cert. denied*, 372 U.S. 978 (1963) 23
United States v. *Feldman*, 299 F.2d 914 (2d Cir.), *cert. denied*, 370 U.S. 910 (1962) 22
United States v. *Landry*, 257 F.2d 425 (7th Cir. 1958) 24
United States v. *Rizzo*, F.2d (No. 16274, 7th Cir., March 21, 1969) 15, 23

CONSTITUTIONAL AND STATUTORY PROVISIONS:

Amendments to the Constitution:

V 3, 4, 25

UNITED STATES CODE:

Title 18, Section 1503 4
Title 28, Section 1651 4
Title 28, Section 2255 4

RULES OF COURT:

Rule 53, Federal Rules of Criminal Procedure 19
Rule 100, Rules of the United States District Court for the District of Columbia 19
Rules 16-18, Rules of the United States District Court for the District of Maryland 19

SECONDARY SOURCES:

Special Committee on Evaluation of Professional Ethics, American Bar Association, *Code of Professional Responsibility*, Preliminary Draft (January 15, 1969) 19
Project on Minimum Standards for Criminal Justice, American Bar Association, *Standards Relating to Fair Trial and Free Press*, Tentative Draft (1966) 19, 21, 24

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Petitioner seeks a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the captioned case on March 4, 1969.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Appendix A, Pages 1a-15a) appears at 407 F.2d 727 (1969). No petition for rehearing was filed. The United States District Court

for the Eastern District of Wisconsin denied petitioner's motion to vacate sentence in an unreported Opinion and Order dated December 29, 1967 (Appendix A, Pages 15a-22a). A motion to reconsider was also denied in an unreported Order on February 26, 1968 (Appendix A, Page 23a).

JURISDICTION

The judgment of the Court of Appeals was entered on March 4, 1969. By order dated May 26, 1969, Mr. Justice Marshall extended until July 2, 1969, the date by which a petition for certiorari in this case might be filed.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Petitioner Margoles was convicted of attempting to obstruct justice and unlawfully influence a federal officer, the Honorable Robert E. Tehan. His sole defense was entrapment. Through a motion to vacate sentence properly filed with the District Court, petitioner sought to attack his convictions on the grounds that the proceedings were saturated with prejudicial publicity both before and during trial, that Judge Tehan himself had made a pretrial press release seriously prejudicial to the petitioner, and that the trial court had erred in failing to properly safeguard the jury from the effects of the publicity. The District Court denied the motion, and the Court of Appeals affirmed.

The questions presented are:

I. Having just tried and sentenced the defendant on another well publicized charge, may the Chief Judge of

the court in which the defendant has been indicted for attempting to bribe that judge, make with impunity a press release carried by all the local media detailing his version of the alleged bribe attempt a few days before, and emphatically praising the government's star witness, a "friend of a friend" of petitioner, who had agreed to cooperate with the F.B.I. in ensnaring the petitioner?

II. Do the prosecution and law enforcement arms of the government have unlimited discretion to release whatever pretrial information they like to the news media regardless of its inaccuracy and prejudicial effect; or are an accused's rights under the Fifth Amendment violated when the government makes disclosures that are likely to prove prejudicial at trial?

III. Does the right of the public to be informed of the progress of a criminal trial so outweigh the accused's right to a fair trial under the Fifth Amendment that the press may publicize the substance of inadmissible and very damaging evidence presented outside the presence of an unsequestered jury; and if not, what are the proper limitations upon the press, and by what means may the court enforce those limitations?

IV. Is an accused deprived of a fair trial when, in the midst of overwhelming public interest and the publication of dozens of prejudicial news stories, jurors familiar with press accounts of the case, some of whom have already formed opinions, are not examined as to the basis for their subjective assurances that they can impartially try the case, nor carefully questioned during the trial as to whether they have read or heard news accounts of testimony taken out of the jury's presence and ruled inadmissible?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the United States Constitution is set forth in Appendix B, at page 24a. The provisions of the United States Code cited in the indictments and returned against petitioner, and those sections under which petitioner attacked his convictions, are set forth in the same appendix at pages 24a-26a.

STATEMENT OF THE CASE

On October 11, 1960, a federal jury found Dr. Milton Margoles, petitioner herein, guilty of attempting to obstruct justice and unlawfully influence a federal officer—the Honorable Robert E. Tehan—both in violation of 18 U.S.C. § 1503. Petitioner was acquitted of a bribery count contained in an earlier indictment involving the identical facts.* The convictions were affirmed on appeal. *Margoles* v. *United States,* 294 F.2d 371 (7th Cir.), *cert. denied,* 368 U.S. 930 (1961). Petitioner subsequently filed a motion to vacate sentence under 28 U.S.C. § 2255 and § 1651. The motion was denied, and the denial affirmed by the United States Court of Appeals for the Seventh Circuit.

All the charges stemmed from events that occurred immediately after petitioner had, on June 3, 1960, been sentenced by Judge Tehan in another proceeding to a year in prison and fined $15,000 for income tax violations to which he had pleaded *nolo contendere.* On October 24, 1960, after conviction on the two counts of attempting to obstruct justice and influence a federal officer, he was sentenced to an additional term of

* Indirectly offering a thing of value to a federal judge (hereinafter sometimes referred to as the "bribery charge").

five years on each count, to run concurrently with each other, and consecutively to the previous one year term imposed for the tax violation. Petitioner paid the fine, served his sentences, and was paroled from the federal correctional institution at Sandstone, Minnesota in late 1962. His parole expired on October 20, 1966.

It was undisputed at petitioner's trial that on July 12, 1960, he turned over a $5,000 Treasury bond to one Earl Villmow for the purpose of obtaining a suspended sentence on his tax conviction. The testimony was in conflict on the principal issue, however—who originally contrived the idea of approaching Judge Tehan. Petitioner contended that the scheme originated with Villmow (who, the F.B.I. admitted, became a government agent prior to contacting Dr. Margoles), that it was Villmow who originally and continually injected the judge's name and the subject of money into their conversations, and that Villmow unlawfully entrapped petitioner on the government's orders. The government's position was that petitioner devised the plan and that the bond was to be paid to the judge in order to gain his favor.

The prosecution's case rested heavily on Villmow's testimony and credibility, and if the jury were to disbelieve him it would have had to acquit petitioner under the court's erroneous instruction on the defense of entrapment.

Pretrial Publicity

Widespread and prejudicial publicity emanating primarily from government sources was directed against the defendant both before and during his trial. During the two and one-half months between the

bribery indictment and trial,[1] petitioner was the subject of dozens of articles in Milwaukee's two major newspapers, the *Milwaukee Journal* and the *Milwaukee Sentinel*, the first of which alone reached 84 percent of the households in Milwaukee County where all but one of the Margoles jurors lived.[2] Virtually all the articles appeared on either the front page or the "second" front page (the first page of the local news section) (R. 14-24, 80-95),* and all were in varying degrees adverse to the petitioner. It may be fairly inferred that radio and television coverage was comparable.

Only a very small portion of the news accounts were accurate and unbiased, and it is plain that the media cast the doctor as a public enemy. On many occasions he was the subject of deceiving headlines such as "BID TO ELUDE F.B.I. CHARGED TO MARGOLES" (R. 16) and "OFFICERS SAY MARGOLES PLANNED BIGGER BRIBE" (R. 20). The government's allegations were again and again treated as if they were proven facts. At the same time, however, Villmow, the prosecution's key witness (whose testimony was crucial to a determination of the sole defense of entrapment) was consistently portrayed as a hero and a public-spirited citizen who had reported the alleged bribe attempt to the F.B.I. immediately (R. 14-15, 19-24, 80-81, 87-89). Headlines reported, "BRIBERY CASE TRIGGERED BY

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[1] During this period, the second indictment, upon which petitioner was ultimately convicted, was handed down, generating renewed interest in petitioner's case.

[2] Statistics provided by the *Milwaukee Journal*.

* R. = Original transcript of record in the United States Court of Appeals; T. = Transcript of trial proceedings in the United States District Court; V. = Transcript of proceedings upon voir dire.

INFORMANT" (R. 19), "BRIBERY CASE TIPSTER PRAISED" (R. 21) and "TEHAN DETAILS BRIBERY CASE, U. S. JUDGE EXPLAINS FIREMAN'S UNWITTING PARTICIPATION" (R. 24).

The media repeatedly distorted and misrepresented the facts surrounding the charges. The trial transcript is silent, for example, as to the substance of conversations held among Villmow, Robert Tehan, Jr. [the judge's son], Peter Pikofsky (a mutual friend of the two) and the judge on June 28, 1960,[3] but both the *Journal* and the *Sentinel* carried numerous stories characterizing Villmow as having "reported" the alleged bribe attempt to Judge Tehan or as having "tipped-off" the judge about it (R. 14, 20, 80, 87-88). Similarly, although the transcript reveals that the F.B.I. arranged and observed the meetings between Villmow and the accused (T. 89-91, 337-39), an article in the *Sentinel* on August 4, 1960, said there were no witnesses to any of their meetings (R. 87).

Nearly all the pretrial publicity originated with one or another arm of the federal government. The clerk of the District Court publicly acknowledged the need for extraordinary steps to preserve petitioner's right to a fair trial, but even this became the subject of a newspaper article. On September 12, 1960, the *Journal* reported, under the headline "100 JURORS DRAWN FOR MARGOLES CASE" (R. 95), that

> The special panel was ordered by Dale E. Ihlenfeldt, clerk of the federal courts here in

[3] Dr. Margoles did not become involved in this series of events until he was called by Pikofsky four days later. According to Villmow's own testimony, when he urged Dr. Margoles to hire the judge's son, attorney Robert Tehan, Jr., Dr. Margoles indicated that he did not even know of the judge's involvement (T. 273-76).

anticipation of a large number of disqualifications due to the widespread publicity given the case.

Drawing a special jury to hear a criminal case is "very unusual," according to Ihlenfeldt. He said that this was the first such special panel in his almost six years as clerk.

Many of these articles gave source credit to the prosecution itself and to Edward E. Minor and Matthew Corry, the United States attorneys in charge of the case (R. 14, 17-19, 81, 87, 93). Minor, for example, publicly praised Villmow as Dr. Margoles' "intended intermediary" who was under "instructions 'to offer the bond as a bribe to Judge Tehan . . . .'" (R. 14).

Other articles specifically credited the F.B.I. and Gerald C. Gearty, the agent in charge of the local office (R. 16, 19-20, 80). One such article quoted Gearty as stating that Villmow "throughout has fully cooperated with the U.S. government" (R. 19). Still others, detrimental to Dr. Margoles' character, attributed information to other federal officials, including Emil J. Nelson, Director of the Internal Revenue Service for Milwaukee (R. 86, 88). On August 4, 1960, Mr. Nelson, in an article on the "second" front page of the Journal, described a jeopardy tax assessment filed against petitioner as a device "levied only when there is evidence that a deficient taxpayer is distributing assets or putting assets beyond the reach of government collectors" (R. 88).

The day after petitioner's arrest, mysterious "federal authorities who cannot be quoted" were credited with informing the papers that the bond "was only the first installment of a much larger bribe" (R. 20),

though the indictment contained no hint of bigger bribes. There was a steady stream of pretrial articles containing information harmful to the accused which, almost without exception, could not have been written without the active assistance and cooperation of the prosecution and federal law enforcement officials.

In the midst of all this publicity, only two days after petitioner's indictment and arrest, there appeared in the Sunday *Journal* an article headlined, "TEHAN DETAILS BRIBERY CASE, U.S. JUDGE EXPLAINS FIREMAN'S UNWITTING PARTICIPATION" (R. 24). The article began:

> Milwaukee fireman Earl W. Villmow unwittingly and innocently became the vehicle for the alleged attempt by Dr. Milton Margoles to bribe Federal Judge Robert E. Tehan, according to a letter made public Saturday by the Judge.

The story then divulged the contents of a detailed letter written by Judge Tehan—the judge who had heard and sentenced petitioner on the tax charge—to the local fire chief (Villmow's employer), and released to the press by the judge. A similar article was also carried in the Sunday *Sentinel* under a banner headline stretching across the entire top of the "second" front page, reading "BRIBERY CASE TIPSTER PRAISED" (R. 22).

The judge lauded Villmow's part in the whole matter as being, "in my opinion, an outstanding example of good citizenship," and personally praised Villmow as having "reflected great credit" on the fire department. After pointing out that Villmow's testimony was of "vital importance," Judge Tehan proceeded to detail his version of the "facts" surrounding the over-

tures which passed among himself, his son, Villmow, Dr. Margoles, and Peter Pikofsky.[4]

Publicity During Trial

The intensity and character of the news coverage created great community interest in the trial. Newspapers reported that the proceedings were held in a "tense and crowded courtroom" (R. 29) "filled to capacity" (R. 31), and that "tension was high throughout the eight day long case" (R. 46). The *voir dire* became critical, since the District Court had denied petitioner's pretrial motion for a continuance. Despite the publicity, the court did not transfer the case to another part of the judicial district less saturated with publicity, nor had it ordered the drawing of a special panel of veniremen from a distant area of the district, even though in Racine County, also a part of Wisconsin's Eastern District, the *Journal* reached only 13 per cent of the households.[5]

It became apparent during the *voir dire* that many prospective jurors had read about the case, had discussed it with others, and had formed opinions as to guilt or innocence. For the most part the *voir dire* was conducted by the trial judge. The veniremen were not examined individually out of the presence of the others, but were addressed as a group, even when someone

[4] Following petitioner's arrest on July 15, 1960, the *Journal* of that date reported that "it was learned" that Judge Tehan was considering revoking a stay of sentence granted earlier on the tax conviction (R. 16). The source of that information on the judge's intent was not disclosed, however. A few days later a similar article appeared, stating that "Federal officials" were considering cancelling the stay (R. 23).

[5] Counsel's failure to request these remedies could not have been easily overlooked by the District Court.

responded affirmatively to a question. Although numerous veniremen conceded having formed opinions, the court made no attempt to evaluate for itself either the bases for or the strength of their biases. Instead, at one point it explained to the potential jurors that it was the civic duty of citizens to serve as jurors. One of the veniremen volunteered that he had "read about the case," but the trial judge responded, "that's not the question" (V. 25). The court simply elicited and accepted from each prospective talesman his own brief, subjective assurance that he could be impartial (V. 24-28, 56-65, 96-98).

The court made only general inquiries as to whether the veniremen had read or heard about the case and whether they had formed or expressed any opinion regarding the defendant's guilt or innocence. This was true in the case of Mr. Dix and Mr. Apel, for example. Mr. Apel informed the court that he had formed an opinion regarding petitioner's guilt. Mr. Dix, ultimately one of the twelve jurors selected, said that he had discussed the case with his wife (V. 25). The trial judge made no inquiries as to what he had read about the case, however, nor was he warned not to reveal what he had read to his fellow jurors.

Though neither the jury nor the witnesses had been sequestered, the Milwaukee newspapers escalated their coverage of the case as the trial began. From the date the jury was impaneled until two days after the verdict, articles appeared in the *Journal* and the *Sentinel* every day but one, invariably on either the front page or the "second" front page.

On the first day of trial the court granted defendant's motion that witnesses be excluded from the

courtroom. Throughout the trial, however, both of Milwaukee's major papers carried detailed summaries of the testimony of each witness, along with objections of counsel and rulings by the court (R. 27-45). On the second day of trial, the names, ages and addresses of all the jurors and alternates were published in the *Journal* (R. 29).

The papers continued to headline the trial. "MARGOLES' COUNSEL RIPS INTO BRIBE TESTIMONY, READS TRANSCRIPT OF GRAND JURY HEARING: THEN TRIES, BUT FAILS TO SHAKE WITNESSES" (R. 31); "JURY HEARS TESTIMONY ON 'MARGOLES FLIGHT'; FBI AGENTS REPORT, OVER OBJECTIONS HOW DOCTOR DEPARTED FROM HOSPITAL" (R. 34); "TESTIFIES HE STARTED IT ALL, 'THIRD MAN' IN BRIBE TRIAL TELLS OF LINK TO DR. MARGOLES" (R. 37).

Proceedings held outside the presence of the jury were also published. On the fourth day of trial, counsel for petitioner, out of the jury's presence, objected to testimony of one Wendelin Kraft, who was to be called as a witness for the prosecution to testify that petitioner allegedly asked him three times to intercede with Judge Tehan. The trial court excluded this evidence. At the close of the government's case the same day, also out of the jury's presence, counsel moved for a judgment of acquittal based on the defense of entrapment. After hearing argument, and before the jury reentered the courtroom, the court denied defendant's motion (T. 513-14). That evening, the substance of the inadmissible Kraft testimony was detailed on the front page of the *Milwaukee Journal* (R. 35) and was carried on the *Journal's* television channel's eve-

ning news, with Kraft's picture (T. 661-63).[6] The following morning the *Sentinel* carried the story of the denial of petitioner's motion for acquittal under the headline, "DENIES 'TRAP' PLEA TO ACQUIT MARGOLES" (R. 36).

That the jurors had access to these headlines and stories is not only dictated by logic, but evidenced by a statement of the jury foreman. Having been asked whether certain matters were discussed in the jury room, he replied, "No, there was no mention at all that I know of, not in the section I sat in. As soon as I went in, *I read the paper. . . .*" (T. 806) (emphasis added).

On October 11, 1960, the jury rendered its decision.

REASONS FOR GRANTING THE WRIT

First: Because of the position of public influence and trust held by federal judges, this Court must vigorously scrutinize conduct by the bench that publicly destroys the presumption of innocence prior to trial, and tips the scales of justice in favor of the government. In light of the dictates of *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), in which the prosecution was faulted for its public, extra-judicial statements, there is a compelling need to condemn injudicious, partisan remarks by a member of the bench who is personally and intimately involved in a pending case.

Second: Meaningful guidelines must be established to implement the general policies set forth in *Sheppard*. Since that decision, numerous District Courts and

[6] The court took no action on petitioner's motion for a mistrial on the basis of the publicity given the Kraft testimony.

Courts of Appeals have been confronted with instances of prejudicial publicity, both before and during trial, and have generally responded, as seemingly required by *Sheppard,* by evaluating the facts of each case and determining whether the level of prejudice resembles that reached in *Sheppard.* This method has proven inadequate, however, since the *Sheppard* doctrine is difficult to apply. Cases like the instant one point up the need for clearer guidelines in determining whether prejudice to the accused exists or can be inferred in a given case. The goals sought in *Sheppard* can be accomplished only by declaring that the government itself must bear a greater responsibility for curtailing the outflow of prejudicial information likely to reach the press, and by determining whether specific guidelines on what the government can release to the media should be set down, just as specific "warnings" were ultimately held the only effective answer to the conditions which produced *Miranda* v. *Arizona,* 384 U.S. 436 (1966).

Third: This Court should expand the rule of *Marshall* v. *United States,* 360 U.S. 310 (1959), to insure that inadmissible evidence in a criminal proceeding does not reach the minds of jurors through the public media. The decision of the Court of Appeals in this case demonstrates the need for a clearer rule on whether the press should be permitted to publish with impunity accounts of the substance of inadmissible testimony proffered out of the hearing of the jury but in full view of the public, and subsequently transmitted to the unsequestered jurors via the newspapers. As any trial lawyer knows, this is a problem which is faced regularly in cases of notoriety, and which has been recognized by the courts but not adequately dealt with.

Fourth: The variety of techniques used throughout the federal court system for examining jurors before and during the trial of a case that has undergone great public scrutiny has resulted in great confusion as to exactly what the proper role of the court is at these stages. What is permissible in one circuit is impermissible in another. *Compare United States* v. *Rizzo*, ——— F.2d ——— (No. 16724, 7th Cir., March 21, 1969), *and United States* v. *Accardo*, 298 F. 2d 133 (7th Cir. 1962), *with Silverthorne* v. *United States*, 400 F.2d 627 (9th Cir. 1968). The palliative of leaving the matter to judicial discretion has generated serious judicial uncertainty in this area, and it is time for the Court to bring some order out of the existing chaos.

ARGUMENT

Federal Judges Should Be Forbidden from Publicly Lending Support to Either Side in a Pending Case, and from Making Public Press Releases Relating to Its Facts and Merits.

One of the most important areas in which the Court has exercised its supervisory powers concerns the problems posed by prejudicial news coverage and its effect on jurors. See *Marshall* v. *United States*, 360 U.S. 310 (1959). This case is an especially appropriate one for the further use of that power because of the unique involvement of a federal judge in the release of prejudicial news to the press.

As stated in *In Re Murchison*, 349 U.S. 133, 136 (1955), "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" Judge Tehan's letter and its release to the press not only failed to satisfy the appearance of justice, but constituted a flagrant violation of the basic standards of neutrality and impartiality demanded of any civil-

ized court. This Court should forbid, in no uncertain terms, extra-judicial statements by a federal judge praising the character of the government's principal witness in advance of trial. The impact in this case could hardly have been greater had the trial judge himself stepped down from the bench to publicly congratulate the government's star witness upon the completion of his testimony, in full view of the jury. Moreover, Judge Tehan was the Chief Judge of the Eastern District of Wisconsin at the time, and was known to be familiar with the defendant since he had just found him guilty of and sentenced him for a tax violation. Could anyone have read the judge's letter and not believed that he spoke from a position of knowledge and authority?

The harm done by the letter's release was greatly compounded by its substance. The judge made it clear that he believed Villmow was trustworthy and entirely innocent of any criminal design, and that he "unwittingly and completely innocently" became the vehicle for the alleged bribe (R. 21, 24). But the evidence at trial established beyond question that Villmow's involvement was anything but unwitting and innocent. Villmow testified that he had received instructions for his meetings from Agent Thompson of the F.B.I. (T. 219-26), that he had lied repeately to Dr. Margoles (T. 304, 312), and that "all things that [he said] were . . . for the purpose of obtaining evidence against Dr. Margoles" (T. 310). The judge also pointed out in his letter that Villmow had performed an "outstanding example of good citizenship" and had reflected "great credit" on the city fire department, facts to which he undoubtedly would not have been permitted to testify, but which would have an obvious impact on the reading public.

If the prosecution may not release statements for publication which undermine an accused's right to a fair trial, *Sheppard* v. *Maxwell*, 384 U.S. at 363, the parallel obligations of the judiciary must be infinitely greater. Almost every venireman had read about the case in the papers. Yet even if this release was not actually prejudicial—and it is difficult to conceive how any juror reading the article would not have been strongly influenced by it—the letter plainly gave the outrageous appearance that a federal judge and the District Court itself were convinced of petitioner's guilt before trial. Even if Judge Tehan's press release was not a plain violation of due process, it still necessitates that Dr. Margoles' conviction be overturned by this Court. See *In re Murchison*, 349 U.S. at 136.

The Responsibilities of the Press and the Prosecution Must Be Better Balanced, and Greater Emphasis Must Be Placed on Restricting the Release of Prejudicial Information by the Government.

Until now, the Court has attacked the problem of prejudicial publicity by reversing convictions when the evidence indicates the defendant did not receive a fair trial. Because of the difficulty of ascertaining whether there is prejudice in any given case, it has been held that the probability of prejuidce is enough, *In re Murchison*, 349 U.S. 133 (1955), or that prejudice may be inherent in certain situations, *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966); *Turner* v. *Louisiana*, 379 U.S. 466 (1965).

The difficulty in determining the existence of prejudice is not an insurmountable obstacle to devising guidelines for use in preserving the integrity of a trial, however. While the English use of the contempt power has never been favored in this country, we are not

without the ability to limit constitutionally the government's present freedom to make press releases any way it chooses. The "trial by press" cases make one thing abundantly clear: without the cooperation and assistance of the government, most prejudicial articles containing harmful information or misinformation simply cannot be written. To effectively limit the release of such information and thereby strike a better balance between the responsibilities of the press and the government is the only answer to this problem. It is simply too much to expect the press to voluntarily suppress items of great public interest in pending criminal cases, even assuming it felt it could ethically do so and still perform its duty of keeping the public informed.

Given the pervasiveness of modern communications, the source of the prejudicial information is no longer the "basically irrelevant detail" it was in *Rideau* v. *Louisiana*, 373 U.S. 723, 726 (1963). Instead, regulation at the source of prejudicial material is the only way to effectively implement *Sheppard*. To do otherwise is simply to let the matter hang in doubt and to permit defendants to be prejudiced or not, depending on the fortuitous propensities toward notoriety of local prosecutors or law enforcement officials.

This court has already exhibited its dislike for the extra-judicial information that regularly emanates from government sources.[7] *Sheppard* detailed at length the indiscretions of the government in that case. And Mr. Justice Clark, in his dissent in *Rideau*, emphasized his belief that it is not "within the province of law enforcement officers actively to cooperate in activities which tend to make more difficult the achievement of

[7] Likewise at least one Court of Appeals. See *Delaney* v. *United States*, 199 F.2d 107 (1st Cir. 1952).

impartial justice." 373 U.S. at 728. But such practices continue. A few courts have adopted rules dealing with the problem, but for the most part it has been ignored.[8]

As long ago as 1966, the American Bar Association, in Part 1.1 of its tentative draft of Standards Relating to Fair Trial and Free Press, recommended that law enforcement officers, from indictment through trial, not release any statements for dissemination by any means of public communication concerning criminal records or the character or reputation of the accused; the existence or contents of confessions or statements made by the accused; the identity, testimony or credibility of prospective witnesses; or the defendant's guilt or innocence, or other matters relating to the merits of the case.

Similarly, the preliminary draft (January 15, 1969) of the ABA Code of Professional Responsibility dictates that lawyers, including prosecutors, not make extra-judicial statements that a reasonable person would expect to be disseminated by means of public communication. The above mentioned rules for law enforcement officers are there also adopted for attorneys. *Disciplinary Rule 7-107.*

The government certainly violated these standards prior to petitioner's trial, particularly with its repeated praise of Earl Willmow. Whether these are the correct standards to apply, however, is not the question now. But what should be plain is that the District

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[8] See Rule 100, Rules of the United States District Court for the District of Columbia; Rules 16-18, Rules of the United States District Court for the District of Maryland. Most court rules deal only with photographing and broadcasting trial proceedings, and follow the approach of Rule 53 of the Federal Rules of Criminal Procedure.

Courts and the Courts of Appeals need guidelines to assist them in determining which pretrial news releases will be condemned and which will not. The facts of this case present a proper vehicle for such assistance.

The Publication of Testimony and Arguments Held Outside the Presence of an Unsequestered Jury Is Inherently Prejudicial and Should Be Firmly Condemned.

The dangers to an unsequestered jury in a case of great notoriety are obvious. Nearly all the Margoles jurors confessed to having read of the case prior to trial, and although the court gave the usual cautionary instructions not to read or discuss the case,[9] one juror admitted having read newspapers in the jury room, effectively dispelling the fantasy that the jurors were insulated from press accounts of the trial.

On the fourth day of trial the newspapers and television stations carried the substance of a proffer of the very damaging testimony of one Wendelin Kraft, who alleged that petitioner had also approached Kraft about using his influence with Judge Tehan. This testimony had been ruled inadmissible that day in a hearing outside the jury's presence. The media also carried accounts of the denial of a defense motion for acquittal on the ground of entrapment, also made out of the jury's hearing. The following morning the court simply asked the jurors collectively whether they had read or heard about the case the previous evening. The jurors responded with silence, and that concluded the matter (T. 697).

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[9] "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Krulewitch* v. *United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).

There is no doubt that the public has a right to be informed of the course of judicial proceedings. This Court must determine, however, whether that right extends to the publication of proceedings held outside the hearing of the jury. Although the public is generally permitted to be present at such hearings, the newspapers differ markedly from the general public because they have a duty to report to the public. The reading public may at such times, as a practical matter, include unsequestered jurors. While cautionary instructions have been the traditional "remedy" for this problem, *Marshall* v. *United States,* 360 U.S. 310 (1959) has recognized their inadequacy. In that case, jurors had read news accounts of inadmissible testimony and the conviction was reversed, notwithstanding the jurors' assurances that they would not be influenced by the articles and that they could decide the case only on the evidence of record.

It is simply too much to ask a juror to go home in the evening and refrain from reading about a case that has captured the public's interest. Part 3.5(d) of the ABA fair trial-free press standards recognizes this, and suggests that the public be removed or cautioned against publicizing such proceedings prior to the verdict. This is a small price to pay to insure the substance and not just the facade of a fair trial. The district courts should be given firmer guidelines on precisely what their duties are in controlling publicity of such proceedings during trial. It is no answer to permit the newspapers to publish at will, and then to decide after the fact whether the defendant has been prejudiced. Determining the likelihood of the existence of prejudice is difficult enough, and should be simplified by establishing rules on what the media can and cannot do. The fact that there may be a clash between the

First and Fifth amendments in this area is no excuse for inaction if the march of "trial by press" cases to appellate courts is to end.

The Court Must Lay Down Standards To Dispel the Present Confusion Among Circuits in Respect to Examination of Jurors Before and During Trial.

The voir dire examinations prior to and during trial are likely to be the most important part of any criminal proceeding that has been saturated with pretrial publicity. When jurors are improperly screened, the cornerstone upon which a fair trial rests is effectively removed. Yet the mode of examining jurors in the federal courts varies greatly, and the methods are often patently inadequate.

For example, in *Coppedge* v. *United States,* 106 U.S. App. D.C. 275, 272 F.2d 504 (1959), *cert. denied,* 368 U.S. 855 (1961), the District of Columbia Circuit held that jurors examined during trial about whether they have read potentially prejudicial news articles must be examined individually and out of the presence of the other jurors. The same rule has been adopted by the Ninth Circuit in a carefully prepared opinion by Judge Barnes, *Silverthorne* v. *United States,* 400 F.2d 627 (9th Cir. 1968). These procedures were not followed in Dr. Margoles' case, the jurors being asked only the most pro forma and perfunctory questions about the Wendelin Kraft testimony.

The rule appears to be different in the Second and Eighth Circuits where collective negative responses of jurors are considered adequate. *United States* v. *Feldman,* 299 F.2d 914 (2d Cir.), *cert. denied,* 370 U.S. 910 (1962); *Smith* v. *United States,* 236 F.2d 260 (8th Cir.), *cert. denied,* 352 U.S. 909 (1956). The

Seventh Circuit seemed to have at first embraced the *Coppedge* rule in *United States* v. *Accardo,* 298 F.2d 133 (7th Cir. 1962), but now appears to have conclusively abandoned it in *United States* v. *Rizzo,* —— F.2d —— (No. 16274, 7th Cir., March 21, 1969).

The same divergence exists in regard to the voir dire examination prior to trial. Several circuits have held that at that point in the case, absent an examination designed to elicit answers which provide an objective basis for the court's *own* evaluation, "merely going through the form of obtaining jurors' assurances of impartiality is insufficient [to test that impartiality]." *United States ex rel. Bloeth* v. *Denno,* 313 F.2d 364, 372 (2d Cir.), *cert. denied,* 372 U.S. 978 (1963); *accord, Silverthorne* v. *United States,* 400 F.2d 627 (9th Cir. 1968). In this case, however, the Seventh Circuit affirmed the District Court notwithstanding that nearly all the jurors had read of the case prior to trial; that they were asked only the most general questions as to whether they could fairly try the case; that the court never ascertained what they had read; and that the court made no attempt to independently evaluate the jurors' ability to try the case fairly, accepting instead their subjective statements that they could, or their silence.

Regardless of what might be the best procedure in such cases, there is no logical reason why the circuits should have such widely differing rules for voir dire where the danger of prejudice exists. The ABA has recognized this, and has suggested that whenever there is a question of possible prejudice, either before or during trial, each juror or venireman should be examined outside the presence of the others so the court can determine what he has read and heard and how the

exposure has affected his attitude.[10] The voir dire in petitioner's case was a group procedure, and as this Court has already recognized, "each juror was sincere when he said that he would be fair and impartial . . . but psychological impact requiring such a declaration before one's fellows is often its father." *Irvin* v. *Dowd*, 366 U.S. 717, 728 (1961).

The area is woefully in need of workable standards. It is a technical area to be sure, but one in which the evenhanded administration of justice dictates a general rethinking and a departure from the philosophy that each case depends on its special facts. *Marshall* v. *United States*, 360 U.S. 310, (1959).

This case is an excellent vehicle for dealing with this issue, since the prejudicial effect of the news coverage upon the jurors was reinforced by the court's erroneous instruction on the defense of entrapment. The burden is on the government to prove beyond a reasonable doubt that the defendant was not induced to commit the offense, but was predisposed or ready to do so. Where the record presents a close question of guilt or innocence, the failure to so instruct is prejudicial. *United States* v. *Landry*, 257 F.2d 425, 430 (7th Cir. 1958). That this record presents a close question is evidenced by the verdict of not guilty on the related bribery charge.

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[10] Project on Minimum Standards for Criminal Justice, American Bar Association, Standards Relating to Fair Trial and Free Press, Tentative Draft (1966), §§ 3.4(a), 3.5(f).

CONCLUSION

In the *Wall Street Journal* of February 20, 1967, one United States attorney in Milwaukee, conceding the indiscretions in dealing with the press in the *Margoles* case, noted, "We could never get away with anything like that today." Hopefully, he will be proved correct. This case presents the opportunity to finally pave a road along which the press, the courts, the prosecution, and the defendant can travel together in harmony. The Courts of Appeals and the government, in this case and others, have either ignored or misunderstood the lesson this Court sought to teach in its landmark decision in *Sheppard*. Even less has there been an understanding of the vital interrelation between the First and Fifth Amendments in the free press-fair trial context.

Petitioner therefore respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals in this case so that justice may at last be done.

Respectfully submitted,

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